

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. CG 02-278
	)	
Petition for Rulemaking of and Declaratory	)	CG Docket No. 05-338
Ruling of Craig Moskowitz and	)	
Craig Cunningham	)	
To:		The Commission

**COMMENTS OF ABC FINANCIAL SERVICES, INC.**

**I. SUMMARY**

ABC Financial Services, Inc. (“ABC Financial”)<sup>1</sup> submits these comments in response to the Petition for Rulemaking and Declaratory Ruling<sup>2</sup> filed by Petitioners, Craig Moskowitz<sup>3</sup> and Craig Cunningham<sup>4</sup> (together, “Petitioners”). ABC Financial opposes Petitioners’ request for a rulemaking to overturn the Commission’s interpretation of “prior express consent” and, further, contests Petitioners’ argument that the Commission has interpreted “prior express consent” to

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<sup>1</sup> ABC Financial is a third party payment processor that processes health club membership dues and member accounts on behalf of over 6,000 health clubs and gyms throughout the United States, Canada and Puerto Rico. ABC Financial has become the target of a growing number of TCPA lawsuits (including class action lawsuits) and demands despite devoting substantial time and resources in an attempt to ensure full compliance with the TCPA and the rules and orders issued by the Commission.

<sup>2</sup> Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Jan. 22, 2017) (the “*Petition*”).

<sup>3</sup> Whose stated interest is that he is a named plaintiff in a TCPA class action lawsuit filed against a business that the Petitioner voluntarily provided his phone number to.

<sup>4</sup> Whose stated interest is that, based on the Commission’s existing interpretation of “prior express consent,” he has decided not to pursue litigation against a company that purportedly called him after he voluntarily provided the business with his cell phone number.

include implied consent. Finally, ABC Financial opposes the initiation of a rulemaking that would require callers to meet the unduly burdensome prior express consent requirements requested in the Petition.

ABC Financial submits that the Commission's construction of "prior express consent" and its findings that the prior express consent requirement is satisfied when consumers voluntarily release their telephone numbers is consistent with the TCPA. Consumers have a choice when they provide a phone number in a transaction and, accordingly, have complete control over who they receive calls from. Additionally, given the Commission's ruling that prior express consent can be revoked at any time by any reasonable means, consumers have the power to avoid unwanted calls even after they voluntarily provide their number to a caller. The existing rules strike a fair balance between the legitimate business interests of callers and the privacy interests of consumers and the Commission should not initiate a rulemaking to adopt more stringent requirements for obtaining prior express consent.

ABC submits that the Commission should clarify that its finding that persons who knowingly release their phone numbers have given prior express consent to be called at the number which they have given, absent instructions to the contrary, applies outside of the debtor/creditor context. The same underlying principles that apply to the interpretation of "prior express consent" when a number is voluntarily provided to a creditor also apply when consumers voluntarily provide their cellular telephone numbers in other transactions and, to the extent there is any ambiguity in the Commission's previous rulings or orders, the Commission should confirm that the ruling applies to calls made to consumers who voluntarily provide their telephone number in the underlying transaction about which the calls relate.

## II. INTRODUCTION

The Telephone Consumer Protection Act (“TCPA” or the “Act”)<sup>5</sup> was enacted to place “reasonable restrictions” on telemarketing practices in order to protect consumers from unrestricted, intrusive and invasive telemarketing calls.<sup>6</sup> The Act was intended to strike a fair balance between protecting consumers from telemarketing calls and preserving legitimate business activities.<sup>7</sup> In signing the Act into law, President George H. W. Bush recognized the Administration’s opposition to the Act while it was pending before Congress and the concerns that the TCPA “could also lead to unnecessary regulation or curtailment of legitimate business activities.”<sup>8</sup> President Bush went on to state the following in response to such concerns:

I have signed the bill because it gives the Federal Communications Commission **ample authority to preserve legitimate business practice** . . . I also understand that the Act gives the Commission flexibility to adapt these rules to changing market conditions.<sup>9</sup> (emphasis added).

The clear intent to strike a fair balance between protecting consumers and preserving legitimate business practices; however, has not been realized and the TCPA’s intended purpose

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<sup>5</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

<sup>6</sup> See Preamble to TCPA at Public Law 102-243 (1991) at Section 2(7) and 2(15), stating that “Federal law is needed to control residential telemarketing practices” and that “reasonable restrictions” should be placed on automated or prerecorded calls.

<sup>7</sup> See House Report, 102-317, 102d Cong., 1st Session (1991), pp. 14-17 in which Congress expressed its intent to avoid interfering with ongoing business relationships. See also *Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, ¶ 34 (1992) (*1992 TCPA Order*) (“[T]he TCPA does not intend to unduly interfere with ongoing business relationships”).

<sup>8</sup> George Bush: “Statement on Signing the Telephone Consumer Protection Act of 1991,” December 20, 1991. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=20384>

<sup>9</sup> *Id.*

has been frustrated by over-regulation and abusive litigation. As the Commission recognized in its *Declaratory Ruling and Order* released July 10, 2015, the number of TCPA-related individual and class-action lawsuits have increased dramatically since the 2012 Amendments went into effect.<sup>10</sup> This is in stark contrast to Senator Hollings original vision of creating a private-right-of-action for consumers to pursue in “small claims court or a similar court . . . without an attorney.”<sup>11</sup> The rulemaking requested by Petitioners would only serve to further thwart the legislative intent of the TCPA, curtail legitimate business interests and encourage abusive litigation.

### **III. THE COMMISSION’S INTERPRETATION OF “PRIOR EXPRESS CONSENT” IS CONSISTENT WITH THE ACT AND DOES NOT INCLUDE IMPLIED CONSENT**

ABC disagrees with Petitioners’ contention that the Commission’s interpretation of “prior express consent” means consent can be implied. This assertion was addressed in the Commission’s *July 2015 Order* in which the Commission specifically stated: “[t]he TCPA and the Commission’s rules plainly require *express* consent, not implied or ‘presumed’ consent.”<sup>12</sup> Given this clear and unequivocal position taken by the Commission, there is no basis for Petitioners’ request for the Commission to initiate a rulemaking to “overturn the Commission’s improper interpretation that ‘prior express consent’ includes implied consent”<sup>13</sup> and, accordingly, the Commission should refuse to initiate any rulemaking on this moot point.

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<sup>10</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Report and Order, 30 FCC Rcd 7961, 7969, ¶ 6 (July 10, 2015) (*July 2015 Order*).

<sup>11</sup> 137 Cong. Rec. 30821-30822 (1991).

<sup>12</sup> *July 2015 Order*, 30 FCC Rcd 7961, 7991, ¶ 52.

<sup>13</sup> *Petition* at p. 2.

As discussed above, in interpreting the meaning of “prior express consent,” the Commission has stated that “persons who knowingly release their telephone numbers have in effect given their invitation and permission to be called at the number which they have given, absent instructions to the contrary.”<sup>14</sup> This interpretation consistent with Congressional intent and is a reasonable means of ensuring that the TCPA does not hinder legitimate communications that are expected and welcomed by consumers,<sup>15</sup> while at the same time giving consumers control over who they want to receive informational calls from on their cellular telephone. The interpretation also serves the TCPA’s intended purpose of fairly balancing the privacy rights of consumers—who can choose not to provide their cell phone number or can revoke consent after it is provided—with legitimate business activities.

#### **IV. THE COMMISSION SHOULD NOT ISSUE A RULE EXPANDING THE CONSENT REQUIREMENTS FOR INFORMATIONAL CALLS MADE TO CONSUMERS WHO VOLUNTARILY PROVIDE THEIR CELLULAR TELEPHONE NUMBER TO THE CALLER**

A rulemaking adding more burdensome consent requirements is unreasonable and unnecessary given consumers have the power to protect their privacy by simply choosing not to provide their cellular telephone number on a credit application or other transactional document. Because the consumer has complete control over who they provide their cellular telephone number to, they also have the unilateral power to avoid unwanted calls from a specific caller or

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<sup>14</sup> *1992 TCPA Order*, 7 FCC Rcd at 8769, ¶ 31.

<sup>15</sup> When the bill was introduced, Senator Hollings recognized that “[i]f a person consents to receiving such calls, of course, that permission is granted.” *Congressional Record – Senate Proceedings and Debates of the 102nd Congress, First Session*. July 11, 1991, 137 Cong. Rec. 9840.

in relation to a specific transaction.<sup>16</sup> Callers should not be subjected to more burdensome requirements simply because consumers knowingly and voluntarily provide callers with a cell phone number as a point of contact.

Further, in the event a consumer voluntarily provides his or her cellular telephone number on a credit application or other transactional document without realizing that doing so constitutes prior express consent to receive autodialed calls, the consumer can very easily avoid any calls they do not want to receive by revoking the consent. The Commission has ruled that a consumer can revoke consent by any reasonable means.<sup>17</sup> Thus, even if a consumer is deceived into impliedly consenting to receive calls, as Petitioners argue, the consumer can revoke the consent he or she did not understand was given and stop unwanted calls in the future.

The Commission's current interpretation is also fairly tailored to ensure that consumers who knowingly release their phone numbers only receive calls that are "closely related to the purpose for which the telephone number was originally provided."<sup>18</sup> The Commission has recognized that, once an individual's consent is obtained, such consent is "not unlimited."<sup>19</sup> These rulings provide further assurances that consumers will only receive calls that are expected and desired.

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<sup>16</sup> Petitioners contention that consumers are being deceived into impliedly consenting to receive calls ignores the fact that "prior express consent" is only established when the consumer *voluntarily* provides his or her number.

<sup>17</sup> *July 2015 Order*, 30 FCC Rcd at 7990-7991, ¶ 47.

<sup>18</sup> *July 2015 Order*, 30 FCC Rcd at 8028, ¶¶ 140-41, n.474.

<sup>19</sup> *In re Rules & Regulations Implementing the TCPA of 1991*, Declaratory Ruling, 27 FCC Rcd 15391, ¶ 11 (Nov. 26, 2012). The scope of consent is based on the facts of each situation. *Rules & Regulations Implementing the TCPA of 1991*, Declaratory Ruling, 29 FCC Rcd 3442, ¶ 11 (Mar. 27, 2014).

It is unclear how the proposed rulemaking would serve the privacy interests of consumers<sup>20</sup> given their ability to avoid calls altogether by not providing a cell phone number to businesses they do not want to receive calls from. Instead of protecting consumers, the requested rule will curtail legitimate business activities and undoubtedly be used as a “money-making vehicle for individuals and lawyers.”<sup>21</sup>

**V. THE COMMISSION SHOULD CONFIRM THAT IT’S INTERPRETATION OF “PRIOR EXPRESS CONSENT” IS NOT LIMITED TO THE DEBTOR/CREDITOR CONTEXT**

In the *ACA Declaratory Ruling*,<sup>22</sup> the Commission clarified that “autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with ‘prior express consent’ of the called party.”<sup>23</sup> By clarifying its position with respect to calls made by or on behalf of creditors, the Commission did not narrow the scope of its ruling to exclude calls made by persons other than creditors. The Commission’s intent that the aforementioned principles should apply outside of the context of the debtor/creditor relationship was made clear in the *July 2015 Order* in which the Commission affirmed its position that “providing one’s phone number evidences prior express consent to be called at that number, absent instructions to the contrary,” noting that this interpretation is consistent with “Congress’s intent that the TCPA not prohibit

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<sup>20</sup> In fact, Petitioners do not articulate how their own privacy interests have been impacted by the existing rules and regulations but, instead, Petition the Commission to initiate a rulemaking that would benefit them in litigation.

<sup>21</sup> See *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 465 (E.D.N.Y. 2012).

<sup>22</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC Docket No. 07-232, 23 FCC Rcd 559 (2008) (*ACA Declaratory Ruling*).

<sup>23</sup> *Id.* at ¶ 9.

normal business communications.”<sup>24</sup> Calls outside of the creditor/debtor context certainly constitute “normal business communications” that should not be unduly stifled by additional regulations.

**VI. IF THE COMMISSION ISSUES A RULE WITH MORE STRINGENT PRIOR EXPRESS CONSENT REQUIREMENTS IT SHOULD ALSO INCLUDE PROVISIONS TO FAIRLY PROTECT LEGITIMATE BUSINESS INTERESTS**

If the Commission initiates a rulemaking to impose more stringent requirements for obtaining “prior express consent,” the Commission should also amend the rules to fairly protect legitimate business activities and discourage abusive litigation. Specifically, the Commission should issue a rule that caps statutory damages and provides safe harbor for bona fide errors.<sup>25</sup> The FDCPA and TILA, both of which include damages caps and safe harbor provisions, demonstrate that consumer protection statutes can be written in such a way so as to ensure the interests of businesses and consumers are fairly and adequately protected. The Commission should adopt similar provisions to carry out the TCPA’s intended purpose.

**VII. CONCLUSION**

For the reasons stated above, ABC Financial Services, Inc. opposes Petitioners’ requested rulemaking and requests the Commission to confirm that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a person or business in connection with an underlying transaction are permissible as calls made with “prior express consent” of the called party if the calls are closely related to the underlying transaction and the consumer has not given instructions to the contrary.

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<sup>24</sup> *July 2015 Order*, 30 FCC Rcd 7961, 8002, ¶ 76.

<sup>25</sup> Other consumer protection statutes with similar provisions strike the appropriate balance between protecting business activities and the interests of consumers. See Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692k; Truth in Lending Act (“TILA”), 15 U.S.C. § 1640, *et. seq.*



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Respectfully submitted,

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